



## TABLE OF CONTENTS

	<b>Page</b>
I. INTRODUCTION . . . . .	1
II. STANDARD GOVERNING MOTIONS FOR RECONSIDERATION . . . . .	3
III. ARGUMENT . . . . .	4
A. Judge Rosenthal's Decision . . . . .	4
B. Plaintiffs Assert Cognizable Claims in Equity Under the Federal Securities Laws . . . . .	6
1. Plaintiffs May Seek Equitable Remedies Under §10(b) of the Exchange Act . . . . .	6
2. Plaintiffs May Seek Equitable Remedies Under §20A of the Exchange Act . . . . .	7
3. Plaintiffs' Insider-Trading Claims Arise in Part from Fiduciary Duties Defendants Owed Purchasers of Enron's Stock and Defendants Fail to Otherwise Demonstrate Plaintiffs' Claims Are Not Cognizable in Equity . . . . .	8
C. SLUSA Is Inapplicable Here . . . . .	10
D. Recent Supreme Court Authority Shows Plaintiffs' Claims Are Equitable, Not Legal, as Judge Rosenthal Ruled . . . . .	11
IV. CONCLUSION . . . . .	13

## TABLE OF AUTHORITIES

CASES	Page
<i>Chiarella v. United States</i> , 445 U.S. 222 (1980) . . . . .	8, 9
<i>Deckert v. Independence Shares Corp.</i> , 311 U.S. 282 (1940) . . . . .	2, 4, 5, 6
<i>Dirks v. SEC</i> , 463 U.S. 646 (1983) . . . . .	9
<i>Garza Gutierrez v. Deloitte &amp; Touche</i> , 147 F. Supp. 2d 584 (W.D. Tex. 2001) . . . . .	10
<i>Global Access Ltd. v. AT&amp;T, Corp.</i> , 987 F. Supp. 1459 (S.D. Fla. 1997) . . . . .	4
<i>Gratz v. Claughton</i> , 187 F.2d 46 (2d Cir. 1951) . . . . .	9
<i>Great-West Life &amp; Annuity Ins. Co. v. Knudson</i> , 534 U.S. 204, 122 S. Ct. 708 (2002) . . . . .	1, 3, 11, 12
<i>Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.</i> , 527 U.S. 308 (1999) . . . . .	<i>passim</i>
<i>Hardy v. Merrill Lynch, Pierce, Fenner &amp; Smith, Inc.</i> , No. 01 Civ. 5973 (NRB), 2001 WL 1524471 (S.D.N.Y. Nov. 30, 2001) . . . . .	11
<i>Harris Trust &amp; Sav. Bank v. Salomon Smith Barney, Inc.</i> , 530 U.S. 238 (2000) . . . . .	12
<i>Herman &amp; MacLean v. Huddleston</i> , 459 U.S. 375 (1983) . . . . .	11
<i>Hines v. ESC Strategic Funds, Inc.</i> , No. 3:99-0530, 1999 WL 1705503 (M.D. Tenn. Sept. 17, 1999) . . . . .	11
<i>In re Cady, Roberts &amp; Co.</i> , SEC Release No. 6668, 1961 WL 60638 (Nov. 8, 1961) . . . . .	9
<i>Kardon v. Nat'l Gypsum Co.</i> , 73 F. Supp. 798 (E.D. Pa. 1947) . . . . .	6
<i>Lander v. Hartford Life &amp; Annuity Ins. Co.</i> , 251 F.3d 101 (2d Cir. 2001) . . . . .	11
<i>Loumar, Inc. v. Smith</i> , 698 F.2d 759 (5th Cir. 1983) . . . . .	3

	<b>Page</b>
<i>Newby v. Enron Corp.</i> , No. H-01-3624, 2002 U.S. Dist. LEXIS 486 (S.D. Tex. Jan. 8, 2002) . . . . .	<i>passim</i>
<i>Newby v. Enron Corp.</i> , No. H-01-3624 (S.D. Tex. Feb. 25, 2002) . . . . .	7
<i>United States v. O'Hagan</i> , 521 U.S. 642 (1997) . . . . .	7, 8
<i>Rosen v. Cascade Int'l</i> , 21 F.3d 1520 (11th Cir. 1994) . . . . .	6, 7
<i>SEC v. Murphy</i> , 626 F.2d 633 (9th Cir. 1980) . . . . .	9
<i>Simon DeBartolo Group, L.P. v. Richard E. Jacobs Group, Inc.</i> , 186 F.3d 157 (2d Cir. 1999) . . . . .	9, 10
<i>Stevenson v. Four Winds Travel, Inc.</i> , 462 F.2d 899 (5th Cir. 1972) . . . . .	3
<i>United States ex rel. Rahman v. Oncology Assocs.</i> , 198 F.3d 489 (4th Cir. 1999) . . . . .	1, 5, 6
<i>United States v. Chestman</i> , 947 F.2d 551 (2d Cir. 1991) . . . . .	9
<i>United States v. Koenig</i> , 290 F.2d 166 (5th Cir. 1961), <i>aff'd sub nom DiBella v. United States</i> , 369 U.S. 121 (1962) . . . . .	4
<i>United States v. O'Keefe</i> , 128 F.3d 885 (5th Cir. 1997) . . . . .	3, 6, 7
<i>Villareal v. Braswell Motor Freight Lines, Inc.</i> , 545 F.2d 978 (5th Cir. 1977) . . . . .	3, 6, 7

## **STATUTES, RULES AND REGULATIONS**

15 U.S.C.	
§78bb(f) . . . . .	10
§78bb(f)(5)(B) . . . . .	10

## **LEGISLATIVE HISTORY**

H.R. Conf. Rep.	
No. 105-803, at 13-15 (1998) . . . . .	10



## I. INTRODUCTION

In a 44-page Memorandum Opinion and Order ("Order") the Honorable Lee H. Rosenthal *rejected* arguments raised by defendants in opposition to plaintiff's motion to freeze insider-trading proceeds, namely that the Court lacked the power to (among other things) impose a constructive trust over defendants' insider-trading proceeds. *Newby v. Enron Corp.*, No. H-01-3624, 2002 U.S. Dist. LEXIS 486 (S.D. Tex. Jan. 8, 2002). Defendants had argued repeatedly, in initial briefing, at oral argument, and in subsequent supplemental briefing, that under the Supreme Court's decision in *Grupo*, Judge Rosenthal did not have the authority to freeze their insider-trading proceeds because plaintiffs sought legal, not equitable, remedies. Having failed to persuade Judge Rosenthal of the merits of their position when this matter was first briefed exhaustively, defendants Andrew Fastow, Ken Harrison, Rebecca Mark-Jusbasche, and the Outside Directors<sup>1</sup> now request that this Court overrule Judge Rosenthal's Order. But, aside from submitting the Supreme Court's recent decision in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 122 S. Ct. 708 (2002), which actually supports Judge Rosenthal's Order, defendants offer no new arguments or authorities to justify their reconsideration motions.<sup>2</sup>

In her Order, Judge Rosenthal applied *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), and held the Court has the authority to freeze defendants' insider-trading proceeds. Judge Rosenthal concluded that plaintiffs asserted cognizable claims in equity under §§10(b) and 20A of the Securities Exchange Act of 1934, and that the equitable remedies plaintiffs seek were historically available in equity. *Newby*, 2002 U.S. Dist. LEXIS 486, at \*25-\*54. She employed the extensive analysis under *Grupo* applied by Judge Niemeyer, who wrote the Fourth Circuit's opinion in *United States ex rel. Rahman v. Oncology Assocs.*, 198 F.3d 489 (4th Cir. 1999). See 2002 U.S. Dist. LEXIS 486, at \*19-\*23. Judge Rosenthal also recognized the Supreme Court's

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<sup>1</sup>The Outside Directors are Robert A. Belfer, Norman P. Blake, Jr., Ronnie C. Chan, John H. Duncan, Wendy L. Gramm, Robert J. Jaedicke, Charles A. LeMaistre, and Joe H. Foy.

<sup>2</sup>See, e.g., Defendants' Joint Brief Regarding Limits on the District Court's Equitable Power to Grant a Prejudgment Restraint on Defendants' Assets ("Defs' Joint Supp. Brief") filed on Dec. 12, 2001; see also responses filed by Arthur Andersen LLP on Dec. 6, 2001, the Outside Directors on Dec. 6, 2001, Rebecca Mark-Jusbasche on Dec. 7, 2001, Jeffrey Skilling, and certain Officer Defendants on Dec. 10, 2001.

decision in *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940), which interpreted jurisdictional provisions of the federal securities laws very similar to those relied upon by plaintiffs and affirmed a district court's power to enter a preliminary injunction freezing assets. 2002 U.S. Dist. LEXIS 486, at \*16-\*21, \*27-\*29. The analyses of Judge Rosenthal and Judge Niemeyer are well reasoned, and, as Judge Rosenthal observed, a number of circuit courts have applied *Grupo* to uphold preliminary injunctions freezing assets. *Id.* at \*19-\*20 & n.5.

For the fourth time now, Mr. Fastow argues that the claims asserted by plaintiffs are not cognizable in equity. According to Mr. Fastow, Rule 10b-5 (promulgated under §10(b)) provides no equitable remedies. Fastow at 3-4. Defendants, however, already conceded plaintiffs may seek equitable remedies under the federal securities statutes, plaintiffs argued they may seek equitable remedies under §§10(b) and 20A, and Judge Rosenthal extensively analyzed plaintiffs' equitable remedies. Mr. Fastow nevertheless argues reliance on the fraud-on-the-market theory precludes a court from granting equitable relief and therefore plaintiffs have no cognizable claims in equity. Fastow at 4. But this doctrine is inapplicable here, because (among other things) insider-trading claims, not fraud-on-the-market claims, are the basis for plaintiffs' preliminary injunction motion. *See infra* §III.B.1. Finally, Mr. Fastow contends, without citation to a single case, the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") preempts injunctive relief in this case. Fastow at 6-7. But SLUSA applies only to covered class actions which arise under state law. Here, plaintiffs assert claims under the federal securities laws in federal court. SLUSA simply does not apply. *See infra* §III.C.

Likewise, the Outside Directors, joined by Mr. Harrison, for the fourth time argue the claims asserted by plaintiffs are not cognizable in equity. But they claim that their argument attacking Judge Rosenthal's analysis was "never advanced." Outside Directors at 2, 5. The Outside Directors claim Judge Rosenthal erred in observing that plaintiffs' insider-trading claims arise (in part) from fiduciary duties owed plaintiffs by defendants when Judge Rosenthal analyzed the equitable nature of the claims. *Id.* at 5-9. But it is axiomatic that under the federal securities laws, officers and directors who trade on inside information breach their fiduciary duties, engendering equitable claims to the ill-gotten proceeds. Notably, the Outside Directors do not cite any decision in a case brought



under the federal securities laws to support their argument. The Outside Directors and Mr. Harrison also argue plaintiffs bring claims on behalf of "purchasers," not "shareholders," and as a matter of law they owe no fiduciary duty to "purchasers." *Id.* at 5. Again, the Outside Directors do not cite any decision in a case brought under the federal securities laws to support their argument. It has long been established that under the federal securities laws, insiders who trade in their corporation's stock have a fiduciary relationship with purchasers. *See infra* §III.B.3.

Finally, Ms. Mark-Jusbasche submits *Great-West*, claiming this recently-decided U.S. Supreme Court opinion will "assist [] the understanding" of plaintiffs' claims and demonstrate—once again—why plaintiffs' claims are legal, not equitable. Mark-Jusbasche at 2. *Great-West* is distinguishable. As the Supreme Court itself stated, the analysis in *Grupo* lies in an "other context" than *Great-West*, namely the power of district court to enter prejudgment restraints on assets. 122 S. Ct. at 716. Moreover, Ms. Mark-Jusbasche ignores key portions of Justice Scalia's majority opinion concerning equitable claims. Indeed, even if *Great-West* were applicable here, *Great-West* makes clear that where a party seeks a constructive trust over money or property which in good conscience belongs to a plaintiff, the claim is equitable. *See infra* §III.D.

Defendants fail to show any error of law or fact made by Judge Rosenthal and the Court should deny their motions to reconsider Judge Rosenthal's thorough, well-reasoned Order.

## **II. STANDARD GOVERNING MOTIONS FOR RECONSIDERATION**

Defendants request the Court to take the exceptional step of overruling Judge Rosenthal's Order. "A judge should hesitate to undo his work. Still more should he hesitate to undo the work of another judge." *Loumar, Inc. v. Smith*, 698 F.2d 759, 762 (5th Cir. 1983) (citation omitted). "[W]hen a district judge has rendered a decision in a case, and the case is later transferred to another judge, the successor should not ordinarily overrule the earlier decision." *Id. Accord United States v. O'Keefe*, 128 F.3d 885, 891 (5th Cir. 1997). The Court "should respect and not overrule such decision and order," *Stevenson v. Four Winds Travel, Inc.*, 462 F.2d 899, 904-05 (5th Cir. 1972), even if it "might have decided matters differently." *O'Keefe*, 128 F.3d at 891. *See Villareal v. Braswell Motor Freight Lines, Inc.*, 545 F.2d 978, 979-80 (5th Cir. 1977) (mere difference of opinion is not "tantamount to the 'clear' mistake of law" necessary to "reassess[] the amalgamation

of legal principles, facts and judicial discretion undergirding the rulings of another trial court"); *United States v. Koenig*, 290 F.2d 166, 173-74 (5th Cir. 1961) ("generally, one judge, in coordinate jurisdiction with another judge, should not overrule that other"), *aff'd sub nom. DiBella v. United States*, 369 U.S. 121 (1962); *Global Access Ltd. v. AT&T, Corp.*, 987 F. Supp. 1459, 1461 (S.D. Fla. 1997) ("overturning the ruling of a predecessor judge is an exceptional step, not to be taken lightly").

### III. ARGUMENT

#### A. Judge Rosenthal's Decision

The issue before Judge Rosenthal (which defendants now argue for a fourth time) was whether the Court had the authority to freeze insider-trading proceeds. Defendants argued *Grupo* prohibited injunctive relief. Judge Rosenthal disagreed. She read *Grupo* as prohibiting "prejudgment preliminary injunction[s] limiting the defendant's use of assets if the plaintiff sought only money damages." *Newby*, 2002 U.S. Dist. LEXIS 486, at \*15. Judge Rosenthal concluded a freeze order was permissible in this case because plaintiffs seek both legal and equitable relief.

Judge Rosenthal predicated her conclusion on the plain language of *Grupo* itself and on *Deckert*. In *Deckert*, plaintiffs asserted claims under the Securities Act of 1933 and requested an accounting, appointment of a receiver, and sought an injunction restraining the defendant's corporation from transferring or disposing of any corporate assets. 311 U.S. at 288. The *Deckert* Court, remarked Judge Rosenthal, "affirmed the district court's power to enter a prejudgment preliminary injunction freezing those assets because plaintiffs did not seek only money damages, but also equitable remedies of rescission and restitution." *Newby*, 2002 U.S. Dist. LEXIS 486, at \*16. Judge Rosenthal observed that in *Deckert*, the Supreme Court held:

"[T]he Securities Act does *not* restrict [those] seeking relief under its provisions to a money judgment. On the contrary, the Act as a whole indicates an intention to establish a statutory right which the litigant may enforce in designated courts by such legal or equitable actions or procedures as would normally be available to him.... If petitioners' bill states a cause of action when tested by the customary rules governing suits of such character, the Securities Act authorizes maintenance of such suit."

*Id.* at \*28-\*29 (quoting *Deckert*, 311 U.S. at 287-88). Judge Rosenthal further noted the "Supreme Court has acknowledged the availability of equitable remedies to enforce provisions of the Exchange Act" and a "number of cases assume or affirm that generally available equitable remedies may be



used in actions under the Exchange Act." *Id.* at \*29. Defendants acknowledged this authority in their opposition papers. *Id.*

In addition to the plain language of *Grupo* and *Deckert*, Judge Rosenthal relied on Judge Niemeyer's decision in *Rahman*, interpreting *Grupo* and *Deckert*. Judge Niemeyer explained "that because both money damages and equitable relief are sought ... the controlling authority is not *Grupo Mexicano* but *Deckert*." *Rahman*, 198 F.3d at 492. Following *Rahman's* framework, Judge Rosenthal began with an analysis of the claims plaintiffs raised to determine if they were equitable in nature so that *Deckert*, rather than *Grupo*, governed. *Newby*, 2002 U.S. Dist. LEXIS 486, at \*23. If plaintiffs did seek cognizable equitable relief, Judge Rosenthal declared plaintiffs "must show a sufficient nexus between the assets sought to be frozen and the equitable relief plaintiffs request." *Id.* Defendants do not challenge these conclusions.

Judge Rosenthal found support for awarding equitable relief in this case in §20A of the Exchange Act itself, which provides an express right of action for insider trading. The "statute calculates damages not to exceed a restitutionary measure," and thus the "statutory authorization for equitable remedies, even when those remedies are in the form of a monetary award, does not strip them of their equitable character." *Id.* at \*31-\*32. Judge Rosenthal explained:

The cases confirm that when a plaintiff asserts a cognizable claim in equity, even if in conjunction with a claim for money damages, a court has the power to issue a preliminary injunction freezing defendant's assets if the applicant satisfies the requirements for such relief.... Neither the statutory causes of action Amalgamated pleads, nor the fact that it seeks substantial money damages, preclude this court from considering the application for a temporary restraining order. To determine whether such an order is authorized in this case, this court analyzes whether Amalgamated's equitable claims are cognizable and have a sufficient nexus to the defendants' assets at issue.

*Id.* at \*36-\*38.

Based on her extensive analysis, Judge Rosenthal then held that plaintiffs alleged cognizable claims in equity under §§10(b) and 20A of the Exchange Act. Judge Rosenthal recognized the axiom that insider-trading claims arise from a fiduciary duty owed by a corporation's officers and directors to the stockholders of the corporation. In so doing, she stated that constructive trusts – "the formula through which the conscience of equity finds expression" – and accountings were equitable remedies at common law to deprive a fiduciary of profits he obtained in breach of his duties. *Id.* at

\*41 (citation omitted). Judge Rosenthal further stated that courts "have used the remedy of an equitable accounting ... in suits brought under section 10(b) of the Exchange Act." *Id.* at \*52. In conclusion, Judge Rosenthal found, "A nexus between the cognizable claims in the suit and the assets of defendants has been alleged. "It is enough at this time to determine that the bill contains allegations which, if proved, entitle petitioner to some equitable relief."" *Id.* at \*53 (quoting *Rahman*, 198 F.3d at 498); *Deckert*, 311 U.S. at 289. It is Judge Rosenthal's holding that plaintiffs' claims are cognizable in equity which defendants largely challenge. For the fourth time now, defendants argue that plaintiffs' insider-trading claims are not cognizable in equity.

**B. Plaintiffs Assert Cognizable Claims in Equity Under the Federal Securities Laws**

**1. Plaintiffs May Seek Equitable Remedies Under §10(b) of the Exchange Act**

Defendant Fastow urges the Court to overturn Judge Rosenthal's decision because Rule 10b-5 purportedly provides no equitable remedies. Mr. Fastow has already conceded "that a plaintiff may invoke otherwise available general equitable powers, conferred on courts by the Judiciary Act of 1789, in a case under the securities statutes." *Newby*, 2002 U.S. Dist LEXIS 486, at \*29; *see also* Defendants' Joint brief Regarding Limits on the District's Courts Equitable Power to Grant a Prejudgment Restraint on Defendants' Assets at 12-13. Judge Rosenthal, moreover, found ample "cases [that] assume or affirm that generally available equitable remedies may be used in actions under the Exchange Act," including decisions from the Supreme Court and the Fifth Circuit. *Id.* at \*29. Judge Rosenthal observed that in "the first case to recognize a private right of action under section 10(b) of the Exchange Act, the court awarded an equitable accounting for profits to shareholders suing the officers and directors for insider trading." *Id.* (citing *Kardon v. Nat'l Gypsum Co.*, 73 F. Supp. 798 (E.D. Pa. 1947)). Judge Rosenthal's reasoning is sound and reconsideration of the equitable remedies available in a suit for insider-trading violations of §10(b) is unjustified. *See O'Keefe*, 128 F.3d at 891; *Villareal*, 545 F.2d at 979-80.

Mr. Fastow attempts to discredit Judge Rosenthal's Order with *Rosen v. Cascade Int'l*, 21 F.3d 1520 (11th Cir. 1994), a case previously cited by defendants. Judge Rosenthal discussed *Rosen* at length and distinguished it from this case. *Newby*, 2002 U.S. Dist LEXIS 486, at \*36-\*38. The



*Rosen* court's pronouncement that "the federal securities claims against [the defendants] give the appellees causes of action for damages only" also does not limit the authority of the Court to invoke its general equitable powers. 21 F.3d at 1526; *see also* 2002 U.S. Dist. LEXIS 486, at \*29-\*30; Fastow at 3 n.4. Again, defendants, including Mr. Fastow, have conceded this point. *See Newby*, 2002 U.S. Dist LEXIS 486, at \*29. Mr. Fastow's citation to *Rosen* is simply an attempt to revisit prior, failed arguments. *See Newby v. Enron Corp.*, No. H-01-3624, slip op. (S.D. Tex. Feb. 25, 2002) (declining to revisit decision when no new argument is raised); *see also O'Keefe*, 128 F.3d at 891 (admonishing court not to overrule a prior court's ruling because of mere differences in opinion as to the state of the law); *Villareal*, 545 F.2d at 979-80 (same).

Finally, Mr. Fastow argues that plaintiffs' "inescapable reliance on the fraud-on-the-market theory underscores the non-equitable nature of [its] claims." Fastow at 4. Although couched in new terms, this argument merely rehashes his (and the other defendants') prior arguments that plaintiffs' insider-trading claims are not cognizable in equity. Nevertheless, the fraud-on-the-market presumption is irrelevant to plaintiffs' claims for disgorgement of illegal insider trading proceeds. Although plaintiffs rely on that theory to support the claim arising from defendants' misrepresentations and omissions, here plaintiffs seek equitable disgorgement of insider-trading proceeds, not legal damages for the misrepresentations and omissions. In *United States v. O'Hagan*, 521 U.S. 642, 652 (1997), the Supreme Court declared "[t]rading on [inside] information qualifies as a 'deceptive device' under §10(b)." As Judge Rosenthal observed in her Order, "A number of cases ... affirm the enforcement of section 10(b) liability through disgorgement of defendant's insider trading profits to private plaintiffs, a remedy different from obtaining damages measured by plaintiff's out-of-pocket losses." *Newby*, 2002 U.S. Dist. LEXIS 486, at \*33-\*34.

## **2. Plaintiffs May Seek Equitable Remedies Under §20A of the Exchange Act**

Mr. Fastow asks the Court to find Judge Rosenthal erred by concluding that the private remedies available for violation of §20A are equitable because the word "damages" is used in §20A. Fastow at 4-5. This very argument was raised by defendants in supplemental briefing before Judge Rosenthal. *Compare* Fastow at 4-5 *with* Defs' Joint Supp. Brief at 16. Judge Rosenthal, in a well-



reasoned analysis supported by Judge Niemeyer's opinion in *Rahman*, other case law and treatise authority, and legislative history, held that §20A provides equitable disgorgement, and that under §20A, "the statutory authorization for equitable remedies, even when those remedies are in the form of a monetary award, does not strip them of their equitable character." *Newby*, 2002 U.S. Dist. LEXIS 486, at \*32. This issue has been decided – correctly – and the Court should decline to reopen it.

**3. Plaintiffs' Insider-Trading Claims Arise in Part from Fiduciary Duties Defendants Owed Purchasers of Enron's Stock and Defendants Fail to Otherwise Demonstrate Plaintiffs' Claims Are Not Cognizable in Equity**

Defendants contend plaintiffs cannot assert cognizable claims in equity because they owed no fiduciary duty to plaintiffs who made contemporaneous trades in Enron stock with them. But, defendants premise their arguments on state corporations law and ignore the substantial federal authority imposing such duties on officers and directors who trade on inside information. That defendants owed duties to the class of purchasers pursuant to plaintiffs' insider-trading claims is well-established, and it was not raised "*sua sponte*" by Judge Rosenthal, as the Outside Directors claim. The proposition is such a fundamental one that it was never disputed by defendants, who now complain that plaintiffs did not expressly argue it in their motion to freeze insider-trading proceeds. Indeed, Judge Rosenthal's Order demonstrates that Judge Rosenthal, like courts before her, recognized defendants' duty as axiomatic.

In *O'Hagan*, the Supreme Court held, "§10(b) and Rule 10b-5 are violated when a corporate insider trades in the securities of his corporation on the basis of material, nonpublic information." 521 U.S. at 651-52. The Court explained, "[t]rading on such information qualifies as a 'deceptive device' under §10(b) ... because 'a relationship of trust and confidence [exists] between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation.'" *Id.* at 652 (quoting *Chiarella v. United States*, 445 U.S. 222, 228 (1980)). "That relationship," the Court added, "gives rise to a duty to disclose [or to abstain from trading] because of the 'necessity of preventing a corporate insider from taking unfair advantage of ... uninformed ... stockholders.'" *Id.* (quoting *Chiarella*, 445 U.S. at 228-29). *Accord*

*Dirks v. SEC*, 463 U.S. 646, 653 (1983) (an insider's "duty [to disclose or abstain from trading] arises ... from the existence of a fiduciary relationship").

Officers and directors owe a fiduciary duty not only to their shareholders but also to purchasers. "The insider's fiduciary duties ... run to a buyer (a shareholder-to-be) and to a seller (a pre-existing shareholder) of securities, even though the buyer technically does not have a fiduciary relationship with the insider prior to the trade." *United States v. Chestman*, 947 F.2d 551, 565 n.2 (2d Cir. 1991) (en banc). See also *Simon DeBartolo Group, L.P. v. Richard E. Jabobs Group, Inc.*, 186 F.3d 157, 169 & n.5 (2d Cir. 1999); *SEC v. Murphy*, 626 F.2d 633, 652 n.23 (9th Cir. 1980); *In re Cady, Roberts & Co.*, SEC Release No. 6668, 1961 WL 60638, at \*5 & n.23 (Nov. 8, 1961). In the seminal case of *Cady, Roberts*, the SEC rejected a "contention that an insider's responsibility [under §10(b) and Rule 10b-5] is limited to existing stockholders and that [an insider] has no special duties when sales of securities are made to non-stockholders." 1961 WL 60638, at \*5. The SEC explained, "This approach is too narrow. It ignores the plight of the buying public – wholly unprotected from the misuse of special information." *Id.* Embracing Judge Learned Hand's reasoning in *Gratz v. Claughton*, 187 F.2d 46 (2d Cir. 1951), a decision addressing the statutory insider-trading provisions of the Exchange Act, the SEC stated, "the director or officer assumed a fiduciary relation to the buyer by the very sale; for it would be a sorry distinction to allow him to use the advantage of his position to induce the buyer into the position of a beneficiary although he was forbidden to do so once the buyer had become one." 1961 WL 60638, at \*5 n.23 (quoting 187 F.2d at 49). In *Chiarella*, the Supreme Court approved the analysis of Judge Hand in *Gratz* and its application in *Cady, Roberts*. 445 U.S. at 226-27 & n.8; see *Chestman*, 947 F.2d at 565 n.2.

Indeed, Supreme Court decisions and the weight of other decisions rendered under the federal securities laws hold corporate insiders breach their fiduciary duties to purchasers by trading on inside information. See, e.g., *Chiarella*, 445 U.S. 226-27 & n.8; *Simon DeBartolo*, 186 F.3d at 169 & n.5; *Cady, Roberts*, 1961 WL 60638, at \*5 & n.23. Defendants cite no applicable authority to the contrary. The claim of the Outside Directors that they, "as a matter of law ... owe[d] no fiduciary duty to the purchasers" (Outside Directors at 5) of Enron stock thus fails, as does Mr. Fastow's contention that an equitable accounting is available – if at all – only to Enron itself. See *id.*



The Outside Directors suggest that because Judge Rosenthal's Order omits citation to decisions recognizing fiduciary relationships between insiders and purchasers of their shares, no authority exists for this proposition. Outside Directors at 9 ("the Order appears to be based on the erroneous assumption that ... the rights of prospective purchasers of shares are coextensive with those of shareholders"). The Outside Directors overlook Judge Rosenthal's finding that the "relationship between a corporation's officers and directors and the stockholders ... has long been held to be fiduciary in nature." *Newby*, 2002 U.S. Dist. LEXIS 486, at \*43-\*44. Moreover, it is not unusual for courts to refer to existing shareholders and purchasers as "stockholders" in general when describing the fiduciary duties of insiders. *See Simon DeBartolo*, 186 F.3d at 169 & n.5. Judge Rosenthal correctly held that plaintiffs' insider-trading claims are cognizable in equity.

### C. SLUSA Is Inapplicable Here

Raising a new argument for "reconsideration," Mr. Fastow contends that SLUSA, 15 U.S.C. §78bb(f), "preempts" plaintiffs' request for injunctive relief. This argument not only is untimely but also is devoid of legal support.

SLUSA states a covered class action "***based upon*** the statutory or common law of any State" cannot be maintained.<sup>3</sup> 15 U.S.C. §78bb(f)(1) (emphasis added). Thus, a plaintiff must assert claims under the federal securities laws to maintain a covered securities class action. *See* H.R. Conf. Rep. No. 105-803, at 13-15 (1998) (SLUSA established "uniform national rules" for securities class actions and required covered class actions to be "maintained pursuant to the provisions of the Federal securities law, in Federal court").

SLUSA is inapplicable here because the claims against the Individual Defendants are not "based upon" the law of Texas or any other state. *See Garza Gutierrez v. Deloitte & Touche*, 147 F. Supp. 2d 584, 589 (W.D. Tex. 2001) ("SLUSA was enacted in response to a perceived 'loophole'

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<sup>3</sup>SLUSA defines a "covered" class action as any single lawsuit where damages are sought on behalf of more than 50 persons or one or more named parties seek to recover damages on a representative basis and common questions of law or fact predominate, or a group of lawsuits with analogous criteria seek damages on behalf of more than 50 persons and the lawsuits are joined, consolidated, or proceed as a single action. 15 U.S.C. §78bb(f)(5)(B).



in the PSLRA which allowed investors alleging securities violations to avoid the PSLRA by bringing their claims against corporate issuers in state court."). As Mr. Fastow well knows, the claims against him arise under the federal securities laws and are pending in federal court. See Amalgamated Amended Complaint's Claims For Relief, filed on December 11, 2001 (asserting violations of §§10(b), 20(a) and 20A of the Exchange Act, Rule 10b-5 promulgated thereunder, and §§11 & 15 of the Securities Act). Cf. *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 110 (2d Cir. 2001) (where "plaintiffs' claims are based *solely* on the statutory and common law of Connecticut," SLUSA applies) (emphasis added); *Hardy v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 01 Civ. 5973 (NRB), 2001 WL 1524471, at \*3 (S.D.N.Y. Nov. 30, 2001) ("The action clearly purports to be based on state law, as the complaint alleges only breach of fiduciary duty."); *Hines v. ESC Strategic Funds, Inc.*, No. 3:99-0530, 1999 WL 1705503, at \*4 (M.D. Tenn. Sept. 17, 1999) (SLUSA applicable because plaintiffs claims "are all based on Tennessee law"). SLUSA has nothing to do with this action's claims under the *federal* securities laws. Mr. Fastow's argument is meritless.

**D. Recent Supreme Court Authority Shows Plaintiffs' Claims Are Equitable, Not Legal, as Judge Rosenthal Ruled**

Ms. Mark-Jusbasche claims the Supreme Court's decision in *Great-West*, purportedly demonstrates that a "statutory Exchange Act damages remedy is purely *legal*, not equitable." Mark-Jusbasche at 1 (emphasis in original). Nothing could be further from the truth. *First*, *Great-West* concerned whether ERISA authorized an action to enforce a reimbursement provision of an ERISA plan, *not* a district court's power to enter a prejudgment restraint on assets. For this reason, as the Supreme Court itself stated, the *Grupo* analysis here lies in an "other context" than *Great-West*. *Great-West*, 122 S. Ct. at 716. *Second*, the federal securities laws, intended to be broad remedial statutes, are very different than ERISA. Indeed, the Supreme Court has "repeatedly recognized that securities laws ... should be construed 'not technically and restrictively, but flexibly to effectuate [their] remedial purposes.'" *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386-87 (1983) (citations omitted). In contrast, the provision of ERISA at issue in *Great-West* involved a "limitation

of relief" that would have been made "pointless" were the Court to construe the statute otherwise. *Great-West*, 122 S. Ct. at 716.

*Finally*, even if *Great-West* applied here, it would not preclude plaintiffs from asserting cognizable claims in equity under the federal securities laws. Indeed, Ms. Mark-Jusbasche's discussion of *Great-West* ignores the Court's characterization of *equitable relief*, which precisely describes plaintiffs' claims: "[A] plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.* at 714. This is the relief plaintiffs seek: "the Class will suffer irreparable harm unless the Court imposes a constructive trust upon the Individual Defendants' *insider trading proceeds*.... And disgorgement of the Individual Defendants' *insider trading proceeds* is the only viable avenue of recovery ...." Plaintiff's *Ex Parte* Application for a Temporary Restraining Order, at 9 (emphasis added).

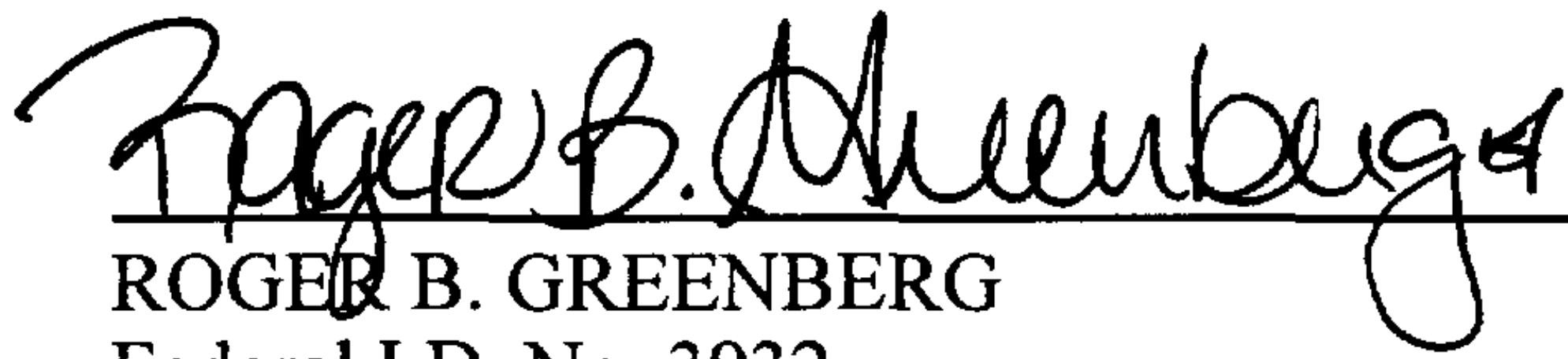
In *Great-West*, the Court found petitioners' claims were legal because they sought to impose personal liability "for a contractual obligation to pay money – relief that was typically not available in equity." 122 S. Ct. at 712-13. No contractual claims are asserted here. Moreover, Justice Scalia explained that where property is obtained "through means or under circumstances" which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same." *Id.* at 715 (quoting *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000)). But, Ms. Mark-Jusbasche misreads *Great-West* to hold that for restitution to lie in equity, the action must seek to "restore to the plaintiff specific funds or property that were once in plaintiff's possession but that are now in the defendant's possession." Mark-Jusbasche at 2. The opinion, in fact, holds that restitution lies in equity when money or property "belonging in good conscience" to plaintiff may be traced to a defendant. 122 S. Ct. at 714. No "possession" requirement is imposed on plaintiffs. *Id.*

#### IV. CONCLUSION

Defendants show no error in Judge Rosenthal's reasoning and aver no new facts, and submit a Supreme Court opinion that is in an "other context" from here, and, even if it were applicable, would support plaintiffs. Defendants' motions for reconsideration therefore should be denied in their entirety.

DATED: March 7, 2002

Respectfully submitted,



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DECLARATION OF SERVICE BY MAIL

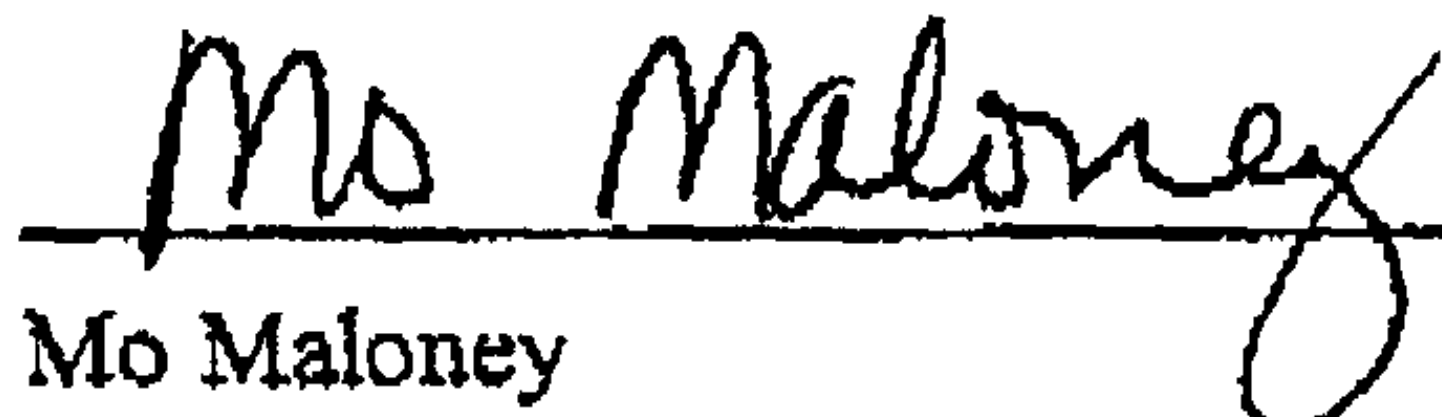
I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interest in the within action; that declarant's business address is 401 B Street, Suite 1700, San Diego, California 92101.

2 That on March 7, 2002, declarant served the LEAD PLAINTIFF'S OPPOSITION TO CERTAIN DEFENDANTS' MOTIONS TO RECONSIDER JUDGE ROSENTHAL'S ORDER DATED JANUARY 8, 2002 by depositing a true copy thereof in a United States mailbox at San Diego, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List

3 That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 7th day of March, 2002, at San Diego, California.

  
Mo Maloney

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Service List - 03/05/02  
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Service List - 03/05/02  
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Service List - 03/05/02  
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Service List - 03/05/02  
Page 4

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